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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

VALENCIA GATEWAY RETAIL,
IV, LLC,

Plaintiff and Respondent,

v.

ALEXANDER WOLTMAN et al.,

Defendants and Appellants.

B288726

(Los Angeles County
Super. Ct. No. PC056453)

APPEAL from a judgment of the Superior Court of Los Angeles
County. Melvin D. Sandvig, Judge. Affirmed.

Bewley, Lassleben & Miller and Ernie Zachary Park for
Plaintiff and Respondent.

Erick Garcia for Defendants and Appellants.

This appeal concerns a lease originally entered into between two nonparties to the appellate proceedings: AMA Corporation (Tenant) and Gateway Village, LLC. The present dispute, however, is between appellants Michael Rescigno and Alexander Woltman (Guarantors), who guaranteed Tenant's obligations under the lease, and respondent Valencia Gateway Retail IV, LLC (Landlord) who is the successor-in-interest to the original lessor.¹

Guarantors appeal following a bench trial where Tenant and Guarantors were found liable respectively for breach of the lease and the guaranty for failure to pay amounts owed. As Landlord was the prevailing party on contracts with attorney's fee clauses, the trial court also awarded attorney's fees against Tenant and Guarantors.

On appeal, Guarantors contend: (1) the judgment should be offset by the amount Landlord overcharged Tenant on tax and common area maintenance (CAM) charges; and (2) attorney's fees were improperly assessed against them because the fees are subsumed in the guaranty's limitation of liability, which was reached by Guarantors' liability on the underlying judgment.

We disagree and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. Underlying Facts

Tenant entered into the "Gateway Village Shopping Center Lease," for an 8000-square foot store with Landlord's predecessor in interest Gateway Village, LLC. Guarantors guaranteed

¹ There were three guarantors. The third guarantor was Andrew Walter. Walter defaulted in the underlying action, and is not a party to this appeal. Nor is AMA, the tenant under the lease. AMA was a defendant in the underlying action.

Tenant's obligations under the lease up to an amount equal to six months' charges due under the lease.² The lease was for a term of six years beginning on July 8, 2010 and expiring on July 31, 2016. The rent increased annually by three percent, and like many commercial leases, Tenant was required to pay CAM charges, which were also capped at a three percent increase per year.

Initially, Gateway Village, LLC sent Tenant invoices that contained only two items: CAM and rent. After Landlord purchased the shopping center and took over the lease in April 2013, it modified the format of invoices. Landlord began dividing CAM into various line item charges instead of having one all-encompassing CAM charge. Landlord also began charging Tenant property taxes as a new item, not included within CAM. Upon receiving the invoices, Tenant complained that the itemized CAM charges exceeded the annual three percent cap. Tenant also complained that the property taxes should be included within the CAM charges, and also subject to the CAM cap. Tenant contacted property management about the increase in charges and wrote on each rent check, "we dispute the C.A.M. charges." Landlord disagreed stating, "the C.A.M.S should be what they are. We're correct." Despite the alleged overcharges, Tenant continued to pay each invoice in full until February or March of 2015 when it stopped paying CAM charges. In July

² The Guarantors were jointly and severally liable for any obligation due under the terms of the guaranty up to a maximum amount of \$258,880.00 for the first three years. After three years, Guarantors' liability was "limited to an amount equal to six months[] charges due under the [l]ease." In July 2013, the initial liability cap became limited to an amount equal to six months' charges.

2015, Tenant ceased paying Landlord altogether, and in November, Tenant vacated the premises.

2. Pleadings

In June 2015, Landlord brought suit against Tenant and Guarantors asserting two causes of action: (1) breach of the lease as a result of Tenant's failure to pay the amount due, and (2) breach of guaranty for Guarantors' refusal to pay their share of liability for Tenant's breach of the lease.

Tenant and Guarantors each filed answers to Landlord's complaint. In their respective answers, Tenant and Guarantors raised various affirmative defenses alleging that Landlord was responsible for both Tenant's failure to pay rent, for Guarantors' subsequent failure to pay their share of liability. Neither Tenant nor Guarantors raised the affirmative defense that damages should be offset for any overcharges Tenant paid. However, Tenant filed a cross-complaint, which alleged that Landlord breached the contract by increasing taxes and CAM charges above the annual three percent cap. Guarantors did not file a cross-complaint.

3. Bench Trial and Judgment

The matter was litigated in a bench trial. While Landlord argued Tenant had breached the lease, Tenant and Guarantors took the position that Landlord "overcharged an average of \$8500 per year" with respect to CAM charges, and therefore the court should limit Tenant's and Guarantors' liability accordingly. Although counsel represented that there was a rough overcharge amount of \$8500 per year, no documentary evidence was offered in support. Tenant and Guarantors claimed that there were e-mails showing that the CAM increased by 11 to 12 percent per year, no such e-mails or analysis were proffered at trial, nor was

any witness able to provide a specific dollar amount. In light of this, Landlord asserted that there was a paucity of proof that an overcharge occurred, and thus no basis for an offset.

Landlord prepared Exhibit 19 to assist the trial court with the calculation of damages.³ The trial court relied upon Exhibit 19 to calculate the amount to award Landlord. How damages were calculated in Exhibit 19 was straightforward. The court started with the base rent and the capped CAM charges when Landlord took over the lease, which were undisputed numbers from an estoppel certificate. Then, for each subsequent year on the lease, the court increased the rent and CAM by three percent. When summed, this produced the total amount owed. The court, then, subtracted from the total amount owed all payments of any nature that Tenant had previously made; that is, “all the accruing charges, the credits for rent paid, [and] the credit for the security deposit.” The subtraction accounted for all payments, which would have included overcharged payments.

The parties, however, disagreed with respect to the total amount owed by Tenant. Landlord acknowledged that there was an annual three percent CAM cap, but the parties disputed whether or not property taxes were a CAM charge to be included within the cap. Therefore, Exhibit 19 contained two calculations, 19.1 and 19.2, reflecting the parties’ respective positions. If the CAM cap *did not* include a cap on property taxes, Exhibit 19.1 calculated Tenant’s liability at \$285,426.28. However, if the

³ The trial court repeatedly referred to Exhibit 19 to calculate the amount to award Landlord. Guarantors did not provide Exhibit 19 in the record on appeal, and neither party augmented the record when asked for additional appellate briefing on this issue. As a result, our understanding of Exhibit 19 is limited to the proceedings in the Reporter’s Transcript.

CAM cap *did* include a cap property taxes, Exhibit 19.2 calculated Tenant's liability at \$247,637.76.⁴ Guarantors' liability, which was "equal to six months[] charges due under the lease," was calculated by adding the monthly rent, \$13,191.32, and monthly CAM, \$2,775.65, and multiplying that sum by six months, for a total of \$95,801.82.⁵ Guarantors did not dispute the 19.2 calculation at trial.⁶

The trial court entered judgment against Tenant and Guarantors, for, respectively breaching the lease and guaranty by failing to pay rent and CAM charges. However, the trial court determined that because the lease was ambiguous as to whether property taxes were subject to the annual three percent CAM cap, the ambiguity would be construed against the drafter; here, against the Landlord by way of its predecessor in interest. In the end, the trial court relied upon the calculations in Exhibit 19.2 to determine the amount to award Landlord. The court entered

⁴ This is the net liability after subtracting what Tenant paid.

⁵ At trial, Landlord noted that the "six months[]" charges" was ambiguous as to what six-month period should be used to calculate the amount of liability. Landlord used the six-month period "at the time the defendants defaulted and had ceased paying rent altogether," which Landlord claimed was July 2015.

⁶ Guarantors did not claim that the 19.2 calculation should be reduced due to any additional CAM overcharges, rather they contended that the damages should be offset with respect to a different claim of damage due to noise from the gym that adjoined Tenant. This argument is not pursued on appeal.

judgment using the same amount in Exhibit 19.2, specifically, \$247,637.76 against Tenant and \$95,801.82 against Guarantors.⁷

4. *Prevailing Party Attorney's Fees*

Landlord filed its motion for attorney's fees after the bench trial. The guaranty stated that “ ‘[i]f Landlord is required to enforce Guarantor's obligations by legal proceedings, Guarantor shall pay to Landlord all costs incurred, including, without limitation, reasonable attorney's fees.’ ” Although the court assessed attorney's fees against both Tenant and Guarantors, only Guarantors opposed Landlord's motion for attorney's fees, arguing that the court cannot assess fees against them because attorney's fees are included within the limitation of liability “equal to six months[] charges due under the lease,” which was reached by the underlying judgment. The court rejected this argument, finding the limitation of liability applied only to damages, not costs. The court awarded \$30,365.00 in attorney's fees. Guarantors filed their timely notice of appeal from the judgment and the attorney's fees order.

⁷ There is some ambiguity in the language of the judgment. On the one hand, the trial court stated in its judgment that “[t]he cross-complainant shall take nothing by way of said cross-complaint,” which indicates that the court found against Tenant's claim in its cross-complaint that Landlord had breached the contract by increasing taxes and CAM charges above the annual three percent cap. On the other hand, the trial court in entering judgment, first determined the total amount owed to Landlord under the lease, and then reduced that amount by what Tenant paid. Thus, all charges that Tenant paid, including any overcharges in taxes and CAM charges, were subtracted from the total amount owed under the lease.

DISCUSSION

The essential question framed on appeal is: Did the judgment and award of attorney's fees exceed Guarantors' contractual limitation on liability? We conclude that it did not. Guarantors raise two points. First, Guarantors argue that the court erred by not offsetting the judgment by the amount Landlord overcharged Tenant on CAM charges. Second, Guarantors argue that attorney's fees cannot be assessed against them because the guaranty has a limitation of liability, which was reached by the underlying judgment. We reject both arguments.

1. *The Trial Court Correctly Calculated and Gave Credit for Improper Property Tax Charges*

At trial, Guarantors and Tenant agreed that CAM charges could only increase by three percent per year, but disagreed as to whether property taxes were included within CAM. The nub of Guarantors' claim is that the trial court erred by failing to find that property taxes were included within CAM, and as a result, also erred by not offsetting Tenant's overpaid property taxes from the judgment. Guarantors claim fails for several reasons. First, the trial court in fact construed the CAM cap to apply to property taxes, and the record indicates the court did offset for any overcharges Tenant paid in its calculation of damages.⁸ Second, Guarantors have failed to meet their burden showing otherwise. Third, even if the trial court did not apply an offset, the amount

⁸ This court requested additional letter briefs from the parties to address whether the trial court interpreted the lease against Landlord to include property taxes within the CAM cap, and whether the trial court offset any overcharges above the three percent CAM cap.

Guarantors allege in overcharges is inconsequential to their share of liability.

The record demonstrates that the trial court agreed with Tenant and Guarantors, construing the CAM cap to apply to property taxes. Specifically, the trial court found that the lease was ambiguous as to whether property taxes were included within the CAM cap, and therefore, following California's contra proferentem doctrine, construed the ambiguity against the drafter. (Cal. Civ. Code § 1654; *Mayhew v. Benninghoff* (1997) 53 Cal.App.4th 1365, 1370 [defining the doctrine as "construing ambiguous agreements against the drafter"].) The ambiguity would be construed against the Landlord as its predecessor in interest had drafted the lease. The trial court stated, "the ambiguity is going to be, you know, as to the plaintiff because it was their contract. So the court is going to limit [property taxes] to the 3 percent" The trial court also relied on Exhibit 19.2 for the judgment, which was prepared to assist the court to calculate damages "consistent with the defendants' argument that the tax should have been included within the C.A.M. cap." When calculating damages, the court subtracted all that Tenant had previously paid from the total amount owed to Landlord under the lease. This subtraction necessarily included any property tax overcharges.

Guarantors' brief on appeal does not demonstrate otherwise. Rather, Guarantors asserted in their additional letter briefs that "there exists *the possibility* that [] the property taxes were not properly offset in the trial court's judgment." (Emphasis added). As appellants, Guarantors have the burden to establish error, namely that the property tax overcharges were not properly offset. (*Pringle v. La Chapelle* (1999) 73 Cal.App.4th

1000, 1003.) The assertion of a mere “possibility” does not satisfy that burden.⁹ Not only does the record demonstrate the trial court deducted any overcharges in calculating damages, Guarantors have not established that Landlord actually overcharged Tenant in the first instance. Indeed, Guarantors admitted that they had not undertaken an analysis of the amount overcharged, and therefore were “. . . not able to tell the court any dollar amount that [they] believe [they] ha[d] been overcharged”

Even if Guarantors could prove Tenant was overcharged its estimated “\$8500 per year,” an offset in this amount would not alter the judgment against them. Guarantors were jointly liable for \$95,801.82 of the \$247,637.76 judgment against Tenant. The offset would have to be in excess of \$151,835.95 — that is, the difference between \$247,637.76 and \$95,801.82 — for the overcharges to have an impact on Guarantors’ joint liability. Landlord took over the lease in April 2013 and Tenant stopped paying CAM in February or March of 2015. This means any CAM overcharges could not have been imposed for longer than 13 months. Multiplying that period of time by charges at \$8500 per

⁹ Beyond Guarantors’ unpersuasive assertion that overcharges were only a “possibility,” we also observe that Guarantors did not provide an adequate record on the subject. Of course, it is the appellant that is taxed with marshalling all relevant materials into an accurate record that supports the claims of error. (*Hearn v. Howard* (2009) 177 Cal.App.4th 1193, 1200.) The trial court expressly relied on Exhibit 19 in reaching its decision. Exhibit 19 is not found in the appellate record. Guarantors’ failure precludes adequate review on this subject, thus justifying affirmance for this additional reason. (*Estrada v. Ramirez* (1999) 71 Cal.App.4th 618, 620.)

year would have had no effect on the amount of Guarantors' liability. For these reasons, we find no error.

2. Attorney's Fees are Recoverable against Guarantors

Guarantors next argue that attorney's fees cannot be assessed against them because their maximum liability was reached by the underlying judgment. Guarantors' argument implicates two clauses in the guaranty that bear on their attorney fees argument. The first is the attorney fees provision itself: "If Landlord is required to enforce Guarantor's obligations by legal proceedings, Guarantor shall pay to Landlord all costs incurred, including, without limitation, reasonable attorney's fees." The second clause on which Guarantors rely is not an attorney's fees clause per se but is the guaranty's general limitation of liability, which states in part, "the [g]uaranty shall be limited to an amount equal to six months[] charges due under the [l]ease."

Guarantors acknowledge that attorney's fees are recoverable under the first clause. But, they claim, the second clause limits the amount of fees recoverable because the "limiting clause did not indicate that any interests or attorney[s] fees would be in addition to the limitation placed on the [G]uarantors." Thus, Guarantors argue that attorney's fees cannot be assessed against them because their maximum liability was reached by the underlying judgment that equaled "six months charges." We disagree. The plain language of the guaranty makes clear that the limitation of liability here does not limit an award of attorney's fees.

On appeal, we review a determination of the legal basis for attorney's fees independently as a question of law. (*Cargill, Inc. v. Souza* (2011) 201 Cal.App.4th 962, 966). We employ the

framework utilized by Division Seven of this District. The first question to be decided is whether the language is “reasonably susceptible” to the interpretation urged by the party. If it is not, that ends the matter. However, if there are colorable arguments, the court moves to the second question: What did the parties intend the language to mean? (*Southern Cal. Edison Co. v. Superior Court* (1995) 37 Cal.App.4th 839, 847-848.)

We need not entertain the second question as guarantors’ interpretation of the attorney’s fees clause is unreasonable. Ordinarily, the objective intent of the contracting parties is to be determined solely by reference to the contract’s terms “if the language is clear and explicit, and does not involve absurdity.” (*Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1264; Civ. Code, § 1638). Courts must also endeavor to give effect to every part of a contract, “if reasonably practicable, each clause helping to interpret the other.” (Civ. Code, § 1641).

The clear and explicit language of the guaranty is that the limitation of liability does not take into account attorney’s fees. The guaranty states, “[g]uarantor shall pay to Landlord all costs incurred, including, *without limitation*, reasonable attorneys’ fees.” (Emphasis added.) The guaranty would not explicitly include a provision to cover all attorney’s fees without limitation if the intention was to subject attorney’s fees to some limitation. Instead, the guaranty would have at least omitted “without limitation,” or stated something to the effect that “attorney’s fees are included in the six month’s limitation on charges.”

We also observe the guaranty obligates Guarantors to pay attorney’s fees as *costs*, as permitted under California Code of Civil Procedure section 1033.5. The purpose of the guaranty was to limit Guarantors obligation to pay *damages*, which does not

alter the contractual burden to pay all *costs*. Costs are not the same as damages. An award of costs is separate from damages recovered and is recoverable by the prevailing party as a matter of right. (Civ. Proc. Code, § 1032(a)(4).) Thus, in the absence of language to the contrary a limitation on the amount of damages would, automatically apply to costs.

DISPOSITION

The judgment and order awarding attorney's fees are affirmed. Respondents are entitled to recover their costs on appeal.

RUBIN, P. J.

WE CONCUR:

BAKER, J.

KIM, J.